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Supreme Court, U.S.
FILED

No. 08-433 SEP 30 2008

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In the Supreme Court of the United States

James T. Anderson,

Petitioner,

vs.

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals opinion conflicts with this Court's precedent by applying a sufficiency of the evidence analysis to the issue of whether any evidence supported petitioner's proposed jury instruction, which was amply evidenced in the record, correctly stated the law and that was not adequately addressed by other more general form instructions.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties shown on the caption of this petition, Michelle Bedard Anderson and Neil Dolinsky were defendants in the district court, but Michelle Anderson was acquitted by the district court of all 28 counts alleged against her and the case against Neil Dolinsky was dismissed on the government's motion. Neither Michelle Bedard Anderson nor Neil Dolinsky appeared in the Court of Appeals, and neither of them is a party to this proceeding or otherwise before the Court in connection with this matter.

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PETITION FOR WRIT OF CERTIORARI

James T. Anderson petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in Case No. 07-1811.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 533 F.3d 623, and is reprinted at App. 2 - 18.

The district court's ruling excluding Petitioner's proposed jury instruction is reflected in the transcripts reproduced at App. 34.

STATEMENT OF JURISDICTION

The Eighth Circuit issued its judgment on July 3, 2008. Petitioner's petition is timely pursuant to Supreme Court Rule 13.1. This Court's jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations . . .

Federal Rule of Criminal Procedure 30 provides, in part:

> (a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets.

STATEMENT OF THE CASE

Petitioner Anderson was convicted of securities fraud and illegal financial transactions undertaken with the proceeds of the securities offenses. To prove the crime of securities fraud, the government was required to prove that James T. Anderson ("Anderson") sold stock issued by Zomax, Inc. "on the basis of" material, non-public information. *United States v. O'Hagan*, 521 U.S. 642 (1997). The evidence demonstrated that Anderson did not sell "on the basis of" inside information. Both before and after the securities trades charged in the Indictment, Anderson received stock options and regularly sold

the Zomax stock that he obtained without regard for Zomax's financial performance or share price. It was Anderson's position that he sold every share of Zomax stock that came into his possession both before and after the counts of conviction, including the shares charged in the Indictment.

Based upon the evidence in the trial record, Anderson proposed the following jury instruction:

> The evidence in this case includes the following specific grounds for finding that Mr. Anderson acted in good faith:
>
> 1. Mr. Anderson sold Zomax stock pursuant to a preexisting plan to do so for the purpose of avoiding an over concentration of highly volatile stock in his investment portfolio, and he therefore did not trade on the basis of material, nonpublic information, which the government must prove to you beyond a reasonable doubt in order for you to determine that Mr. Anderson is guilty of conspiracy, securities fraud, or mail fraud based upon insider trading . . .[1]

The district court rejected Anderson's proposed instruction, and instead gave a generic good faith instruction, as follows:

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[1] Def. Requested Inst. No. 66, reprinted at App. 19 — 22.

> Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.
>
> In order to sustain the charges against the defendant, the government must establish beyond a reasonable doubt that he knew that his conduct in the scheme was calculated to deceive, and nonetheless, the defendant associated himself with the alleged fraudulent scheme.[2]

The district court also instructed that:

> The defendant's position is that any information he possessed prior to those sales was unreliable and therefore not material. Further, it is his position that his August sales were based upon considerations that had nothing to do with that unreliable information. It is the defendant's

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[2] Trial Transcript ("Tr.") XI. 2023, reprinted at App. 36 – 37.

> position that when he sold stock in August, it was with the belief that Zomax business was going to do better than the prior reports and better than the result for the prior year.[3]

On appeal, the Eighth Circuit concluded that Anderson's requested instruction was not required, because, "as noted above, there was little evidence to support the claim of a preexisting plan to sell the stock." 533 F.3d at 632. In assessing whether Anderson's proposed instruction should have been given, the Court of Appeals failed to acknowledge that Anderson's evidence was to be considered in the light most favorable to him. See *United States v. Williams*, 728 F.2d 1402, 1414 (11th Cir. 1984). The Court of Appeals failed to even discuss crucial evidence in the record that supported Anderson's proposed instruction. It also dismissed Anderson's position because the generic instructions given "properly covered the issue of good faith." *Id.* Anderson's conviction thus was upheld without the jury ever being instructed that a preexisting plan to sell Zomax stock disproved the government's "on the basis of" element.

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[3] Tr. XI, 2031-32, reprinted at App. 37 - 38.

REASONS FOR GRANTING REVIEW

The decision below conflicts with this Court's precedent requiring the district court to instruct the jury regarding "any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v. United States*, 485 U.S. 58, 63 (1988) (entrapment instruction). See also *Stephenson v. United States*, 162 U.S. 313, 323 (1896) ("any evidence" regarding manslaughter in murder prosecution sufficient to place the issue before the jury); *United States v. Goldson*, 954 F.2d 51, 55 (2d Cir. 1992) ("It is well settled that a criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in evidence, no matter now weak or incredible that evidence may be").

This record contains sufficient evidence for the jury to have concluded that Anderson always intended to sell his Zomax stock, whether the information regarding Zomax's financial performance was good, bad or nonexistent. Anderson's showing of a "predetermined plan" directly negated the government's evidence that he intended to defraud by "conclusively rebut[ting] an inference of scienter." *In re Worlds of Wonder Secs Lit.*, 35 F.3d 1407, 1427-28 (9th Cir. 1994). Anderson's right to a correctly instructed jury was lost in favor of more generalized statements by the district court that did nothing to explain why the evidence of his preexisting intent to sell his Zomax stock was relevant to its verdict.

The Court of Appeals considered whether the evidence was sufficient to convict pursuant to its

standard and highly deferential Rule 29 standard. But the Court went on to conflate its sufficiency of the evidence analysis (whether the evidence was sufficient to support any rational juror in convicting) with the elements required to support appropriate and correct jury instructions (whether there is *any* evidence to support a defense verdict). In doing so, the Court of Appeals disregarded this Court's mandate that instructions simply must be given if there is "any evidence" to support the defense or if "there exists evidence sufficient for a reasonable jury to find in his favor." *Stephenson,* 162 U.S. at 321; *Matthews*, 485 U.S. at 63.

A. The Record Amply Supported Anderson's Proposed Instruction

The counts of conviction arise from Anderson's sale of Zomax stock during August 2000, commencing approximately six weeks before Zomax released negative information regarding its financial performance. *United States v. Anderson*, 533 F.3d at 627-28. The government insisted that Anderson sold his Zomax stock because confidential information regarding Zomax's performance had come to his attention which led Anderson to unload his Zomax stock in advance of the company's release of the adverse information to the public in September 2000. *Id.* The government also contended that Anderson committed the offense of securities fraud based upon sales of Zomax stock by the trustee of the Jim and Mikki Anderson Charitable Remainder Annuity Trust (the "CRAT") during September 2000. The district court acquitted Anderson on those counts because the trustee acted independently of Anderson.

533 F.3d at 628. The jury convicted on the August 2000 securities fraud counts and on the illegal financial transactions allegations, which involved proceeds allegedly generated by the Zomax stock transactions.

Anderson's defense that he always had intended to sell his Zomax stock was supported by unrebutted evidence that he placed before the jury. That evidence demonstrated that Zomax granted stock options to Anderson on a quarterly basis and that in the quarters that proceeded the single month placed at issue by the Indictment but one, Anderson sold every share of Zomax stock that he possessed, except for the shares that he transferred to the CRAT.

Anderson's evidence showed that he formed a preexisting plan to sell based upon his concern that his assets were over concentrated in Zomax stock, which was volatile and thinly-traded. Anderson's stock sale plan, which he implemented long prior to the charged insider trades that took place during August 2000, had nothing to do with information regarding Zomax's financial performance during the third quarter of 2000 because, among other things, the adverse information did not even exist when Anderson commenced selling his stock.

The evidence of Anderson's intent to sell, regardless of Zomax's financial performance, included the following:

° Zomax's chief financial officer testified as follows:

Q. Sir, would it be fair to say that Jim Anderson had made it fairly well known that he was going to be selling large quantities of stock?

A. Yes.

Q. You know that Mr. Anderson would sell stock fairly routinely through 1999 and 2000, correct?

A. Yes.

Q. To your knowledge, did that subject come up at board meetings, that Jim Anderson was going to be selling his stock, during the 1999 and 2000 time frame?

A. I believe so, yes.

Q. Fair to say that the board of directors knew Jim Anderson was going to be selling?

A. Yes.

Q. In fact, the public knew Jim Anderson was selling a lot of stock as well, didn't they, sir?

A. Yes.[4]

* * *

Q. In fact, back in April of '99 you participated in a conference call with Mr. Anderson that we

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[4] Tr. VI, 985.

heard earlier portions of that on that call later on he told the public he had 95 percent of his assets tied up in Zomax stock, didn't he?

A. Yes, he did.

Q. And that he was going to diversify his assets, right?

A. Correct.

Q. And what did you understand the term "diversify his assets" to mean?

A. That he would be selling some of his Zomax stock to transfer his assets from that stock to some other asset.[5]

° Howard Liszt, an independent director for Zomax and the Board's chairman, testified that:[6]

Q. Did you and the other members of the board of directors, and specifically the compensation committee, learn that Jim Anderson sold off large amounts of his Zomax stock?

A. We learned from time to time that Jim had, umn, sold stock, yes.

Q. And he sold off a lot of his stock; is that fair to say?

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5 Tr. VII, 987.

6 Tr. III, 476-81.

A. At, at different times he would acquire stock at different times and sell stock at different times over those years.[7]

° Anderson told the public in 1999 that he intended to diversify his Zomax holdings during a securities analysts' telephone call.[8]

° Other than the shares that were predestined for the CRAT, Anderson owned none of his prior holdings in Zomax stock during February, March, April, May and June 2000 prior to the July 2000 options exercise that resulted in the August 2000 sales,[9] further evidencing that it was not his practice to hold Zomax stock realized from the options that he exercised.

Anderson's fellow executives at Zomax and the public knew that he sold a lot of Zomax stock, that he "would sell stock fairly routinely through 1999 and 2000,"[10] and that "he would acquire stock at different times and sell stock at different times over those years."[11] Anderson's preexisting intent to sell disproved the government's "on the basis of" case, but the jury never was told why. It was sufficient for Anderson to show that he previously had engaged in a pattern of selling every share he had owned. *See Freeman v. Decio*, 584 F.2d 186, 197 n. 44 (7th Cir. 1978); *Sec. and Exch. Comm'n v. Heartland Advisors,*

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7 Tr. III, 489.

8 Tr. V, 986-87.

9 Tr IX, 1635-37.

10 Tr. VI, 985.

11 Tr. III, 489.

2006 WL 2547090 at 304 (E.D. Wis. 2006); *Sec. and Exch. Comm'n v. Roszak*, 495 F.Supp.2d 875, 890-91 (N.D. Ill. 2007).

The government's own witnesses proved this point through the testimony of James Flaherty and Howard Liszt, and the testimony of FBI Special Agent Todd Thompson, who told the jury that Anderson's trading account held no stock for his own account in the months prior to July 2000, even though he had been granted large blocks of stock options. This was because Anderson routinely exercised options to purchase Zomax stock and then sold his Zomax stock.

This evidence provided an ample basis upon which to instruct the jury regarding Anderson's stock sales. Indeed, this Court's mandate requires a properly instructed jury when there is "any evidence" to support the defense offered up to them. *Stephenson*, 162 U.S. at 323. Even if Anderson's evidence only rose to the level of creating a doubt regarding whether his instruction should have been given, that is more than sufficient to resolve the question in his favor. See *Bradley v. Duncan*, 315 F.3d 1091, 1096 (9th Cir. 2002). The Court of Appeals disregarded this requirement as well, instead electing to summarily disregard Anderson's evidence, the applicable legal standards to apply to the issue, and the correct nature of the instruction that he requested.

B. The Court Of Appeals Erred By Applying A Sufficiency of The Evidence Analysis To The Issue of Whether Anderson's Proposed Jury Instruction Should Have Been Given

The Court of Appeals unduly disregarded the evidence in the record, and adopted wholesale the government's statements of purported facts regarding Anderson's preexisting intent to sell Zomax stock and other critical components of the trial record. For example, the Court of Appeals states that, "beginning on August 4, 2000, and continuing until September 20, 2000, the defendant liquidated every share of Zomax stock that he and his wife owned. Over 800,000 shares were sold during this period for nearly $14 million." 533 F.3d at 627. Yet, as the Court of Appeals later acknowledges in its opinion, the stock sales that occurred during September 2000 were not made by Anderson—they were made by a the trustee of a charitable remainder annuity trust who "acted independently and consistent with his fiduciary duties." *Id.*

The Court of Appeals also subscribed to the government's position that Anderson did not announce a formal stock liquidation plan of the sort later endorsed by the Securities and Exchange Commission as an affirmative defense in civil insider trading cases. 533 F.3d at 630. Yet, SEC Rule 10b5-1, which provides a safe harbor for trading plans in civil cases, was not even enacted when the stock sales at issue here took place. *See* SEC Release No. 33-7881, 34-43154, IC-24599, File No. S7-31-99. There was no requirement that Anderson announce or

publish a formal stock trading plan for him to be entitled to his proposed instruction, because the Court of Appeals was required to assess Anderson's evidence in the light most favorable to him, not in the light most favorable to the government. See *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995).

Similarly the Court of Appeals swallowed whole the government's position that the evidence regarding Anderson's preexisting intent to sell Zomax stock was not sufficient to support his proposed jury instruction. This conclusion, however, was not supported by the record, and in any event, rests upon a faulty understanding of the district court's obligation to instruct as requested by the defendant and as required by this Court in *Matthews* when the evidence is "sufficient for a reasonable jury to find in his favor." *Matthews*, 485 U.S. 63.

The opinion below recites the evidence placed before the jury in determining whether the verdict was sufficiently supported by the record. 533 F.3d at 628-31. The Court of Appeals held that there was sufficient evidence to conclude that Anderson sold "on the basis of" material nonpublic information, stating "there is no indication that the defendant announced a plan in 2000 to completely liquidate all of his Zomax stock within an eight week period during the third quarter of 2000" while noting that Anderson's sales violated internal Zomax policy. 533 F.3d at 631. This conclusion, however, reflects the application of a *Jackson v. Virginia* standard of "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). For purposes of a sufficiency of the evidence review and a motion for a judgment of acquittal, the Court of Appeals applied the correct legal standard.

The Court of Appeals, however, erred by transposing its sufficiency of the evidence analysis to addressing the jury instruction issue. The Court of Appeals should have asked "if no reasonable jury would have reached the same result" considering the evidence in the light most favorable to Anderson. 533 F.3d at 629, quoting *United States v. Tindall*, 455 F.3d 885, 887 (8th Cir. 2006); *Ruiz*, 59 F.3d at 1154. Indeed, while the government's evidence might have supported the verdict pursuant to the highly deferential standard of *Jackson v. Virginia*, the issue here was whether *any* evidence, considered in the light most favorable to the defense, supported the defense instruction. See *Ruiz*, 59 F.3d at 1154. The Court of Appeals never examined the trial evidence to determine whether the instruction was adequately justified by the record and never voiced any understanding of the presumption it was supposed to apply in Anderson's favor. Indeed, the opinion below, in discussing the propriety of Anderson's proposed instruction, refers to its sufficiency of the evidence analysis and states "as noted above, there was little evidence to support the claim of a preexisting plan to sell the stock." 533 F.3d at 632. This is an answer to a sufficiency of the evidence question that was not relevant to the consideration of whether Anderson's evidence, considered in the light most favorable to him, could have caused a reasonable jury to have found in his favor. As discussed above, the record

more than amply supported Mr. Anderson's instruction, any rational juror might have found for him based upon that evidence, and thus the instruction should have been given by the district court.

If perhaps only by omission, the opinion below reveals its own shortcomings by glaringly failing to even mention that the government's own case agent—Federal Bureau of Investigation Special Agent Todd Thompson—concluded based upon his review of Anderson's stock trading records, that Anderson held no stock for his own account in the months prior to August 2000.[12] This evidence directly and unambiguously supported Anderson's proposed instruction, and was specifically called to the attention of the Court of Appeals in Anderson's reply brief before that court, but never is mentioned in the opinion below. Special Agent Thompson's evidence, standing alone, would have supported Anderson's requested instruction. Considered in conjunction with all of Anderson's other evidence regarding his preexisting intent to sell and his actual sales of Zomax stock, the testimony by Special Agent Thompson forces the conclusion that the jury should have been told why the evidence was relevant. Instead, this jury was left adrift to find its own way without the compass of meaningful instructions to guide it.

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[12] Tr. IX, 1635-37.

C. The Court of Appeals Erred By Concluding That The District Court's Instructions Were Sufficient

The Court of Appeals concludes that Anderson's proposed instruction was not required because the "court may give an instruction with a generalized description of the law and facts." 533 F.3d at 632. But the Court of Appeals provides no analysis regarding why, under the circumstances presented by *this* case, the district court's "generalized description of the law and facts" was sufficient. Indeed, a more careful review of this record demonstrates that generalized descriptions can become so general that they fail to convey anything meaningful. See, for example, the district court's curious and admittedly very generalized theory of defense instruction that Anderson's "August sales were based upon considerations that had nothing to do with that unreliable information."[13] Anderson agrees with the conclusion that this statement by the district court is "generalized", perhaps even to the point of uselessness, but he is at a loss to appreciate how such a statement provided any direction whatsoever to the jury.

This jury needed direction, because the evidence before it included weeks of complex and dense testimony regarding Zomax's financial projections, the historical inaccuracy of its financial data, Zomax's stock trading policies, the company's business model, its future prospects, and its share trading price and volume. The "generalized

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[13] Tr. XI, 2031-32, reprinted at App. 38.

description" (as characterized by the Court of Appeal's opinion) instructions regarding good faith did not give this jury any assistance in appreciating that the government's "on the basis of" burden could be affirmatively disproven by Anderson's preexisting intent to sell. The district court's statement that Anderson sold Zomax stock "based upon considerations that had nothing to do" with the evidence only could have served to denigrate his defense, confuse the jury, or both.

Moreover, the fact that the district court partially described Anderson's theory of defense does not provide a justification for the district court's failure to instruct the jury regarding Anderson's pattern of prior stock trades, or why that pattern was so directly pertinent to disproving the government's "on the basis of" burden. See *United States v. Newcomb*, 6 F.3d 1129, 1139 (6th Cir. 1993) (failure to instruct regarding justification defense reversible error). This jury was left without any direction regarding the nexus between Anderson's pattern of stock trades and the effect that evidence had upon undercutting the government's "on the basis of" case. See *Staples v. United States*, 511 U.S. 600 (1994) (*mens rea* element must be clearly defined, especially where the defense is a lack of intent to violate the law; conviction reversed); *United States v. Huffman*, 467 F.2d 189, 191 (9th Cir. 1972) (conviction reversed for failure to define intent in the context of an insanity defense). Because Anderson's illegal monetary transaction counts rest solely upon his securities fraud convictions, those counts should be reversed as well.

CONCLUSION

For the foregoing reasons, petitioner James T. Anderson respectfully requests that this Court grant his Petition for Writ of Certiorari.

September 30, 2008

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-1811/2037

United States,
Plaintiff – Appellee/Cross-Appellant

v.

James T. Anderson,
Defendant – Appellant/Cross-Appellee

Appeal from U.S. District Court for the District of Minnesota - St. Paul
(0:05-cr-00249-PAM-1)
(0:05-cr-00249-PAM-1)

JUDGMENT

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and were argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in these causes is affirmed in accordance with the opinion of this Court.

July 03, 2008

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 07-1811/07-2037

United States,	*	Appeal from the
Appellee/Cross-Appellant,	*	United States
	*	District Court for
v.	*	the District
	*	of Minnesota.
James T. Anderson,	*	
Appellant/Cross-Appellee.	*	

Submitted: January 15, 2008
Filed: July 3, 2008

Before LOKEN, Chief Judge, MURPHY, Circuit Judge, and JARVEY, District Judge.[1]

JARVEY, District Judge.

Defendant James Anderson was convicted of six counts of insider trading and five counts of money laundering arising out of his sales of stock in Zomax Corporation, the company for which he was CEO and chairman of the board of directors. On appeal, he claims that the government's evidence was insufficient to convict him, that the district court[2] erred in failing to give his theory-of-the-case jury instruction and that he is entitled to a new trial. The United States cross-appealed the district court's order imposing sentence, contending that the sentence is

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[1] Judge John A. Jarvey, United States District Judge for the Southern District of Iowa, sitting by designation.

[2] The Honorable Paul A. Magnuson, Senior United States District Judge for the District of Minnesota.

unreasonable because the court erroneously excluded certain stock sales as relevant conduct when considering the U.S. Sentencing Guidelines for illegal insider training. We affirm the defendant's conviction and sentence.

Procedural History

The grand jury for the District of Minnesota returned a thirty-count indictment on August 2, 2005, charging the defendant, his wife Michelle Bedard-Anderson and his friend, Neil Dolinsky. The defendant was charged with conspiracy to commit securities fraud, 18 U.S.C. § 371; six counts of mail fraud, 18 U.S.C. §§ 1341, 1346; seventeen counts of insider trading, 15 U.S.C. § 78(j) and 17 C.F.R. § 240.10b-5; and six counts of money laundering, 18 U.S.C. § 1957. One of the money laundering counts was dismissed by the government prior to trial.

Trial commenced on May 22, 2006. The case against Neil Dolinsky was dismissed by the government prior to the close of its evidence. Following the close of the government's case, the district court dismissed all charges against Michelle Bedard-Anderson, and granted the defendant's motion for judgment of acquittal on the conspiracy count, the mail fraud counts and ten counts of insider trading. The jury found the defendant guilty of six counts of insider trading and five counts of money laundering. The defendant was sentenced to thirty months imprisonment, a $10,000 fine, restitution in the amount of $1,427,937.50, an $1,100 special assessment and a three year term of supervised release. He forfeited an additional $1,990,000 to the United States.

Factual Background

Defendant James Anderson was a founder of Zomax, a replicator of compact discs and DVDs with headquarters in Plymouth, Minnesota. Zomax's stock traded on the NASDAQ. The case against the defendant focused on events at Zomax between July and September of 2000. Beginning in July 2000, the defendant and other Zomax senior officers began receiving reports from managers at Zomax indicating that the company would fall significantly short of its expectations for third-quarter sales and earnings. On July 17, 2000, Zomax's chief financial officer distributed a report indicating that third-quarter sales would be approximately $60 million, significantly short of the $73 million in sales earlier projected by the board of directors.

Despite this projection, the defendant and other senior officers participated in a telephone conference call on July 24, 2000, with financial analysts from the securities industry. In that call, the defendant claimed to be optimistic about the third quarter and projected sales of just over $75 million.

On August 3, 2000, Zomax's controller prepared a sales report indicating that July sales were approximately ten percent short of Zomax's earlier forecast and that third-quarter sales would be approximately $60 million, as opposed to $75 million as earlier projected by Zomax's general managers. The defendant was one of a few officers in the executive group to receive this report.

Beginning on August 4, 2000, and continuing until September 20, 2000, the defendant liquidated every share of Zomax stock that he and his wife owned. Over 800,000 shares were sold during this

period for nearly $14 million. This included the sale of 365,250 shares of Zomax stock held in the name of the defendant and his wife between August 4 and August 24, 2000, for approximately $6,300,000.

On August 17, 2000, the defendant and his wife created a charitable remainder annuity trust ("CRAT"). The trust was funded only with Zomax stock. The trustee of the trust was a certified public accountant with little or no experience as a trustee, who had prepared income tax returns for the defendant and his wife. The defendant directed the CPA to open a brokerage account at Charles Schwab and Company in the name of the trust. The defendant told the trustee he wanted the Zomax stock sold and replaced with municipal bonds.

Between September 6 and September 20, 2000, the trustee sold all 465,000 shares of Zomax stock that had been transferred to the trust. The trustee sold this large block of stock "below the bid" to move the stock faster. Telephone toll records show that the defendant called or attempted to call the trustee on approximately twenty-two occasions during the fourteen days during which the stock was sold. The defendant expressed impatience and annoyance at the inability of the trustee to move the stock faster. However, at the close of the evidence, the district court found that, despite the defendant's involvement, the trustee had acted independently and consistent with his fiduciary duties. All counts relating to the insider trading in the CRAT stock were dismissed.

The day after the final shares of Zomax stock held by the trust were sold, the defendant gave approval to issue a third-quarter press release in

advance of the ordinary third-quarter press release, announcing that Zomax would not meet its third-quarter sales and earnings projections. A copy of the press release was sent by facsimile to the Market Surveillance Section of the National Association of Securities Dealers as required when the company believes that the release will affect trading in the stock. Two minutes after receiving the release, the NASDAQ suspended trading on Zomax stock. When trading resumed thirty-seven minutes later, the price of Zomax stock dropped from $17.38 to $9.56. On September 22, 2000, the stock closed at $8.31 per share. By Monday, September 25, 2000, Zomax stock was trading at $6.84 per share.

Zomax had a written policy regarding insider trading which applied to officers, directors and other key management personnel. The policy prohibited trading in Zomax stock on the basis of material, inside information. The policy further required that all trading activity by officers and directors in Zomax stock be cleared in advance by Zomax's chief financial officer and its outside attorney. The defendant knew of the policy and never advised Zomax's CFO or its outside attorney of the sales or obtained clearance from either of them.

Sufficiency of the Evidence

Corporate insiders with knowledge of material, nonpublic information have a duty to either disclose that information or refrain from using it in the sale or purchase of securities. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2007); 17 CFR § 240.10b-5 (2007).[3] Section 10(b) is violated "when a

[3] Section 10(b) of the Securities Exchange Act states:

corporate insider trades in the securities of his corporation on the basis of material, nonpublic information." United States v. O'Hagan, 521 U.S.642, 651-52 (1997). This is commonly referred to as insider trading.

This Court reviews the sufficiency of the evidence *de novo*, "viewing the evidence in the light

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> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> ...
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 U.S.C. § 78c], any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, promulgated by the SEC pursuant to its rulemaking power under 10(b), makes it unlawful for any person

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5 (2007).

most favorable to the jury verdict and giving the verdict the benefit of all reasonable inferences." United States v. Birdine, 515 F.3d 842 (8th Cir. 2008). "[W]e will reverse only if no reasonable jury would have reached the same result." United States v. Tindall, 455 F.3d 885, 887 (8th Cir. 2006). This standard of review is "very strict." United States v. Spencer, 439 F.3d 905, 913 (8th Cir. 2006) (quoting United States v. Cook, 356 F.3d 913, 917 (8th Cir. 2004)).

Materiality. The defendant contends that the July 17, 2000, report was not "material" information as required by securities law. The defendant cites testimony from various officers and managers of Zomax who, in hindsight, expressed skepticism over the reliability of the sales forecast. The defendant concedes that the controller's August 3rd report contained a forecast for third-quarter revenue of approximately $60 million. Despite the fact that this report contained actual sales revenue from July 2000, the defendant again states that the report was not material because Zomax reports were rarely accurate and because Zomax had prospects for new business that the defendant contends could have made up the $15 million shortfall.

To violate insider-trading laws, the corporate insider must use *material*, nonpublic information. United States v. O'Hagan, 521 U.S. 642, 652 (1997). Further, "No establish a criminal violation of Rule 10b-5, the Government must prove that a person 'willfully' violated the provision" and had knowledge of the rule. Id. at 66566. "Fraudulent intent need not be proven directly, but can be inferred from the facts and circumstances surrounding the defendant's

actions." United States v. Mooney, 401 F.3d 904, 944 (8th Cir. 2005) (citing United States v. Flynn, 196 F.3d 927, 929 (8th Cir. 1999)).

Information is material if there is a "substantial likelihood that a reasonable investor would consider it important in making an investment decision." Mooney, 401 F.3d at 945. While speculative or "soft" information is often immaterial, courts have been reluctant to find it *per se* immaterial. See United States v. Smith, 155 F.3d 1051, 1065 (9th Cir. 1998) ("We have never held nor even hinted – that forward-looking information or intra-quarter data cannot, *as a matter of law*, be material."), *overruled on other grounds by* Konop v. Hawaiian Airlines, Inc., 236 F.3d 1035, 1042 (9th Cir. 2000). This court in Mooney found that an uncertain stock price increase was material, even though speculative, because "it would have been considered important in making investment decisions." Mooney, 401 F.3d at 945.

Several witnesses at trial expressed varying degrees of criticism of the reliability of the company's preliminary or "flash" sales reports. There was evidence that the reports had been significantly inaccurate at times. However, Zomax's controller testified about the detailed nature of these reports. The reports were important to the company, so important that they were prepared from information supplied by the controller and general manager of each of Zomax's facilities. The manner in which these reports was protected by the company also suggests that they were more reliable and more important than the testimony of Zomax officers would suggest. The reports were treated as highly confidential and only a very small number of individuals had access to

this information.

There was also testimony from an industry analyst who made it clear that institutional investors relied heavily on the sales forecasts disseminated to the public. It stands to reason that these institutional investors would want to know that Zomax deeply discounted the value of its most recent forecasts in favor of older, historical trends when predicting Zomax's third-quarter performance. Anderson's suggestion that Zomax was likely to capture other new sales that would make up the deficit in third-quarter sales is supported by exceedingly weak evidence. The jury was instructed on this as a part of the theory of the defense. The jury was under no obligation to accept it. It could find that the defendant traded on material inside information.

"On The Basis Of". The defendant contends that he did not trade "on the basis of material, nonpublic information because of a preexisting plan that he had to sell the stock. To prove insider trading, the Government must show that Anderson traded "*on the basis of* material, nonpublic information." O'Hagan, 521 U.S. at 642 (1997) (emphasis added). This requires that the defendant did not just possess the information but actually used the information. United States v. Smith, 155 F.3d 1051, 1069 (9th Cir. 1998). "[T]he government may not rest upon a demonstration that the suspected inside trader bought or sold while in possession of inside information; rather, it must, at a minimum, prove that the suspect used the information in formulating or consummating his trade." Id. at 1070 n.28. Use of such information can be established through circumstantial evidence. Id. at 1069. ("It is certainly

not necessary that the government present a smoking gun in every insider trading prosecution."). The court in Smith described the type of circumstantial evidence that might establish insider trading:

> [F]or instance, that an individual who has never before invested comes into possession of material nonpublic information and the very next day invests a significant sum of money in substantially out-of-the-money call options. We are confident that the government would have little trouble demonstrating 'use' in such a situation, or in other situations in which unique trading patterns or unusually large trading quantities suggest that an investor had used inside information.

Id. at 1069. The government also need not show that the inside information was the sole reason for the sale or purchase of securities. Id. at 1070 n.28. It is enough that the information was a "significant factor." Id.

The evidence showed that the defendant announced no formal plan in the spring of 2000 to sell Zomax stock. Zomax's chief financial officer testified that he was aware of Anderson's previous sales of stock and that he knew that Anderson would sell more stock. The chairman of Zomax's board of directors at the time of trial testified that Anderson's sales of Zomax stock were of particular interest to the board of directors. The board knew that Anderson would, from time to time, buy and sell Zomax stock. The board was interested to know Anderson's motivation at times for owning or selling Zomax

stock. However, aside from this vague testimony concerning the defendant's propensity to buy and sell Zomax stock, there is no indication that the defendant announced a plan in 2000 to completely liquidate all of his Zomax stock within an eight week period during the third quarter of 2000. Further, these sales violated the Zomax policy requiring pre-clearance of the intended sales by the company's chief financial officer and outside counsel. The jury could find that the defendant traded "on the basis of nonpublic information.

Nonpublic Information. The defendant next contends that the jury could not find that he traded on the basis of "nonpublic" information. NASD rules require that the company issue a pre-release report when the company anticipates releasing financial information that has the potential to significantly affect trading in the stock. On September 21, 2000, defendant Anderson gave authorization to issue Zomax's prerelease concerning its third-quarter performance. That pre-release suggested that the failure of Zomax to achieve projected sales in the third quarter was attributable to general market softness in its European sales, the fact that Zomax's largest customer, Microsoft,[4] had not renewed an important piece of third-quarter business called the TechNet Refresh and because of higher polycarbonate prices.

The defendant contends that all of this information had been available to the public. According to Zomax's CFO, the company had not told the investing public of these events prior to

[4] Microsoft accounted for approximately 10% of Zomax's sales in 2000.

September 21. Industry analyst William Warmington testified that because there was not a lot of publicly available information about this specialized business, the industry relied heavily on Zomax management for information about its business. The loss of the Microsoft business was well known to Zomax in the spring of 2000 but was not disclosed to the public. In July, Anderson had told industry analysts that Zomax had been stockpiling polycarbonate and therefore trends in polycarbonate prices were not an issue for Zomax. While the price of polycarbonate would certainly be public information, the securities industry had no way to determine its effect on Zomax other than to receive information from Zomax. The jury could find that the defendant traded on the basis of nonpublic information.

Denial of Proposed Jury Instruction

The defendant next contends that he was entitled to a "good-faith" instruction stating that the evidence included grounds to find that the defendant acted in good faith by selling his Zomax stock pursuant to a pre-existing plan. Although this specific instruction was denied, the court instructed the jury that it was defendant's position that the August sales of Zomax stock were based upon considerations that had nothing to do with the information that the government claimed was material inside information. Further, the court instructed the jury that a defendant who acts in good faith cannot be found to have the requisite knowing, willful or specific intent to defraud. The good-faith defense instruction further informed the jury that an honest mistake of judgment or negligence was not the equivalent of unlawful intent, that a person who

believes in good faith that his actions comply with the law cannot be found guilty of willfully violating the law and that it remained the government's burden of proof to show that the defendant acted with the intent to defraud.

A defendant is entitled to a jury instruction if the request is timely, supported by the evidence, and a correct statement of the law. United States v. Meads, 479 F.3d 598, 601 (2007). A defendant is not entitled to a "particularly worded instruction." Id. (quoting United States v. Claxton, 276 F.3d 420, 423 (8th Cir. 2002) (internal quotation marks omitted)). Further, a defendant is not entitled to an instruction that contains specific facts and details; a court may give an instruction with a generalized description of the law and facts. See United States v. Johnson, 278 F.3d 749, 752 (8th Cir. 2002) (refusing an instruction that specifically named alleged co-conspirators and described specific conduct). As noted above, there was little evidence to support the claim of a preexisting plan to sell the stock.

This court reviews the denial or acceptance of a proposed jury instruction for abuse of discretion. United States v. Counce, 445 F.3d 1016, 1019 (8th Cir. 2006). This includes a denial of an instruction regarding a theory of defense. See, e.g., United States v. Meads, 479 F.3d 598, 601 (2007) (reviewing the denial of a mere presence theory-of-defense instruction for abuse of discretion). "There is no abuse of discretion in denying a defendant's requested instruction 'if the instruction actually given by the trial court adequately and correctly cover the substance of the requested instruction.' Meads, 479 F.3d at 601 (quoting United States v.

Serrano-Lopez, 366 F.3d 628, 637 (8th Cir. 2004)). The jury instructions here properly covered the issue of good faith.

Admission of Evidence Over a Rule 403 Objection

The defendant contends that the court should not have admitted evidence of Zomax's corporate policies regarding insider trading in part because no one in the company followed it. He further contends that the trial was rendered unfair by remarks made during opening statements and evidence relating to the CRAT sales and other charges that were dismissed during trial.

Rule 403 states the court "may exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. The rule, however, "does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. The rule protects against evidence that is unfairly prejudicial, that is, if it tends to suggest decision on an improper basis." United States v. McAtee, 481 F.3d 1099, 1103 (8th Cir. 2007) (quoting Wade v. Haynes, 633 F.2d 778, 783 (8th Cir. 1981) (internal quotation marks omitted)).

The Zomax corporate policy regarding sales of its stock by officers was properly admitted into evidence. It was probative of the defendant's knowledge of insider-trading laws and of his intent to defraud. Similarly, regardless of the disposition of the charges arising out of the sale of the CRAT stock and against the defendant's friend, Neil Dolinsky, this

evidence was also probative on the issue of the defendant's intent.

We have considered the defendant's other claims of error and reject them.

New Trial

A district court may grant a new trial if "the interest of justice so requires." Fed. R. Crim. P. 33(a). A new trial is appropriate where the court "finds that the verdict is contrary to the weight of the evidence" and where "the court believes a miscarriage of justice may have occurred." United States v. Smart, 501 F.3d 862, 865 (8th Cir. 2007) (internal quotations omitted). We review the denial of a motion for new trial for abuse of discretion. The defendant has not demonstrated a miscarriage of justice. The trial court did not abuse its discretion in denying the defendant's motion for a new trial.

Government's Appeal From the Defendant's Sentence

The government contends that the district court erred in calculating the defendant's total offense level under the Sentencing Guidelines. The court used only the stock sales in the counts for which the defendant was convicted in determining the increase to the base offense level associated with the defendant's gain from committing these crimes. Had the court used all of the defendant's August 2000 sales of Zomax stock to calculate his gain, he would have had a total offense level of 23, rather than 21, as determined by the court. His guideline range for imprisonment would have been 46 to 57 months, rather than the 37 to 46 months calculated by the district court.

The money laundering convictions carried

significantly higher punishment pursuant to the sentencing guidelines. However, the district court found that the money laundering Guidelines overstated the seriousness of the defendant's conduct. The court further found that a sentence calculated pursuant to the Guidelines for securities fraud more appropriately reflected the severity of the offenses. Accordingly, the court departed downward pursuant to Sentencing Guideline 5K2.0 to bring the Guidelines associated with the money laundering counts in line with the securities fraud Guidelines.

The court engaged in an elaborate discussion of the factors set forth in 18 U.S.C. § 3553(a). The court discussed the seriousness of the offense as well as the history and characteristics of the defendant. The court determined that a sentence of thirty months imprisonment promoted respect for the law, provided just punishment, deterred future criminal conduct, protected the public from future crimes and avoided unwarranted sentencing disparity. The court specifically addressed other ways in which the defendant had suffered atypical punishment such as the loss of his reputation and his company, the ongoing case against him from the Securities and Exchange Commission and the harm visited upon him as a result of the fact that his actions brought his wife and friend into the criminal justice system. The court predicted that, upon release from prison, the defendant will lead a law-abiding life and contribute positively to society. Finally, the court found that a sentence of thirty months imprisonment was not disparate from other sentences for similar offenses. The court found that the sentence was reasonable, appropriate and just.

This court reviews a district court's sentence for abuse of discretion. Gall v. United States, 128 S. Ct. 586, 594 (2007). A reviewing court must evaluate the sentence for substantive reasonableness. A court "imposes an unreasonable sentence when it fails to consider a relevant factor that should have received significant weight; . . . gives significant weight to an improper or irrelevant factor; or .. . considers only the appropriate factors but in weighing those factors commits a clear error of judgment.'" United States v. Mousseau, 517 F.3d 1044, 1048-49 (8th Cir. 2008) (quoting United States v. Rouillard, 474 F.3d 551, 556 (8th Cir. 2007)). This court may consider the degree of variance, but a sentence outside the Guidelines range need not be justified by "extraordinary circumstances." This court is to apply a "totality of the circumstances" analysis, taking into account the extent of the variance while giving deference to the district court. Id. at 597; see also United States v. Lehmann, 513 F.3d 805, 808 (8th Cir. 2008) ("[A]s we understand Gall, we now examine the 'substantive reasonableness of the sentence' by taking into account 'the totality of the circumstances, including the extent of any variance from the Guidelines range,' ... and the strength of the stated justification, while viewing the district court's decision through a 'deferential abuse-of-discretion' lens." (quoting Gall, 128 S. Ct. at 598). The court here thoroughly considered the Guidelines and Section 3553(a) factors and did not abuse its discretion by imposing a thirty month sentence of incarceration.

The defendant's conviction and sentence are affirmed.

DEFENDANT JAMES T. ANDERSON'S PROPOSED JURY INSTRUCTION NO. 66

GOOD FAITH

One of the issues in this case is whether the defendant acted in good faith. Because the government must prove beyond a reasonable doubt that Mr. Anderson acted knowingly, willfully, and with a specific intent to defraud, the good faith of Mr. Anderson is a complete defense to the charges of conspiracy, mail fraud, securities fraud and engaging in illegal financial transactions.

A defendant who acted in good faith cannot be found to have acted knowingly, willfully, or with a specific intent to defraud buyers or sellers of Zomax stock, Zomax's shareholders, or the investing public. Good faith on the part of the defendant is simply inconsistent with this unlawful intent. While the term "good faith" has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of malice or ill will, or an intention to act in accordance with the law.

An individual who holds a good faith belief in the accuracy of a statement cannot be found guilty of knowingly causing an untrue statement of material fact. Likewise, an individual who believes that information forming the basis for deciding to engage in a securities transaction is available to the public, or that the information is not material, or that such sales are not made on the basis of material nonpublic information, is not guilty of insider trading, of mail fraud based upon sales of stock by an insider, or a conspiracy to commit those alleged offenses.

An honest mistake of judgment or negligence is not unlawful intent, and a defendant who acts on such a basis still can be acting in good faith. A person who believes in good faith that his actions comply with the law cannot be found guilty of willfully violating the law. This is true even if his belief that he is complying with the law is irrational or unreasonable. Similarly, a person who lacks knowledge regarding the law, or who misunderstands the law, and who believes, as a result of his lack of knowledge or his misunderstanding, that he is complying with the law, does not act willfully. Therefore, if Mr. Anderson believed that he was acting in accordance with the law, he cannot be found to have acted with criminal intent and you must find him not guilty.

The evidence in this case includes the following specific grounds for finding that Mr. Anderson acted in good faith:

1. Mr. Anderson sold Zomax stock pursuant to a preexisting plan to do so for the purpose of avoiding an over concentration of a highly volatile stock in his investment portfolio, and he therefore did not trade on the basis of material, nonpublic information, which the government must prove to you beyond a reasonable doubt in order for you to determine that Mr. Anderson is guilty of conspiracy, securities fraud, or mail fraud based upon insider trading;

2. Mr. Anderson did not engage in conduct with an intent or motive to deceive during the analysts' conference call that took place on July 24, 2000, because the statements that were made at that

time were immaterial, honestly held and agreed upon by independent company officers. The statements were also identified as forward-looking statements, and were accompanied by meaningful cautionary language identifying the important factors that could cause actual results to differ materially from those in the forward-looking statements. In such a case, the statements fall within what the law calls a "safe harbor" against liability or a finding of guilt.

3. Mr. Anderson's stock trades were undertaken openly, were known to the public and were not concealed, in that appropriate Form 144s and Form 4s were filed with the Securities and Exchange Commission, thereby placing the public on notice that Mr. Anderson was engaged in selling Zomax stock, and in that Mr. Anderson made his intent to sell Zomax stock to diversify his portfolio known during the analysts' conference call that took place on April 19, 1999; and

4. Mr. Anderson told the investing public that Zomax set aggressive internal goals and when they exceeded their internal goals in 1999 that they were going to have to raise those internal goals higher.

5. Mr. Anderson actions regarding the CRAT were undertaken in reliance upon the advice of counsel.

Evidence that Mr. Anderson acted in good faith may be considered by you, together with all the other evidence, in determining whether or not he acted with the intent to defraud, knowingly or willfully.

The burden of proving good faith does not rest with Mr. Anderson because Mr. Anderson does not have to prove anything in this case. The prosecution has the burden of proving beyond a reasonable doubt that Mr. Anderson acted knowingly, willfully, and with the specific intent to defraud buyers and sellers of Zomax stock, Zomax's shareholders, and the investing public. If the evidence in this case leaves you with a reasonable doubt regarding whether Mr. Anderson acted in good faith, you must find Mr. Anderson not guilty.

Eighth Circuit Manual Criminal Jury Instructions for the District Courts (2005 ed.), § 9.04 (modified); Sand, Modern Federal Jury Instructions § 8-1 (modified); O'Malley, Grenig& Lee, Federal Jury Practice and Instructions, § 19.06 (5th ed. 2000) (modified); 15 U.S.C. § 78u5(c)(A) (forward looking statements); SEC Rule 10b5-1 (trading plan)

UNITED STATES DISTRICT COURT
District of Minnesota

UNITED STATES OF AMERICA

v.

James T. Anderson

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: Criminal 05-249(1) PAM
USM Number: 12407-041
Social Security Number: 4130
Date of Birth: 1957

Mark Larsen
Defendant's Attorney

THE DEFENDANT: James T. Anderson

[ ] pleaded guilty to count(s): .
[ ] pleaded nolo contendere to counts(s) which was accepted by the court .
[x] was found guilty on count(s) 8 thru 13 and 25 thru 29 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense
15:78j(b), 18:2, and 17 CFR 240.10b-5	Securities Fraud (Insider Trading)
18:1957and 18:2	Engaging in Monetary Transactions in Property Derived fro Specified Unlawful Activity

Offense Ended	Count
8/20/2000	8 thru 13
11/02/2000	25 thru 29

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[x] The defendant has been found not guilty on counts(s) 1 thru 7, and 14 thru 23 of the indictment.
[x] Count(s) 24 was dismissed on May 30, 2006 by U.S. District Court Judge.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in economic circumstances.

March 19, 2007

Date of Imposition of Judgment

s/Paul A. Magnuson

Signature of Judge

PAUL A. MAGNUSON,
Senior United States District Judge
Name & Title of Judge
March 29, 2007
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 30 months as to each count 8 thru 13 and 25 thru 29, to run concurrently.

[x] The court makes the following recommendations to the Bureau of Prisons:

the defendant be designated to the facility in either Yankton, South Dakota, or Duluth, Minnesota. The court further recommends the defendant participate in the 500-hour chemical dependency treatment program.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at on

[ ] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[x] at or before 11:00 a.m. on **Monday, April 23, 2006.**

[x] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three years as to each count 8 thru 13 and counts 25 thru 29 to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection

of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this Judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or

employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony. unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

a The defendant shall not commit any crimes, federal, state, or local.

b The defendant shall abide by the standard conditions of supervised release recommended by the Sentencing Commission.

c The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

d The defendant shall abstain from the use of alcohol and other intoxicants and not frequent establishments whose primary business is the sale of alcoholic beverages.

e The defendant shall participate in a program for alcohol abuse as approved by the probation officer. That program may included testing and inpatient or outpatient treatment, counseling, or a support group. Further, the defendant shall contribute to the costs of such treatment as determined by the Probation Office Co-Payment Program not to exceed the total cost of treatment.

f The defendant shall participate in a psychological or psychiatric counseling or treatment program, as approved by the probation officer. Further, the defendant shall contribute to the costs of such treatment as determined by the Probation Office Co-Payment Program not to exceed the cost of treatment.

g The defendant shall provide the probation officer access to any requested financial information, including credit reports, credit card bills, bank statements, and telephone bills.

h The defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

i The defendant shall not hold employment with fiduciary responsibilities without prior approval from the probation officer.
j The defendant shall cooperate in the collection of DNA as approved by the probation officer and mandated pursuant to 18:3563(a) and 3583(d).
k The defendant shall pay mandatory restitution in the amount of 81,427,937.50.
l The defendant shall pay a fine of S 10,000.
m The defendant shall pay a S1,100 special assessment fine due immediately.
n The defendant shall forfeit 51,990,000 to the United States.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$1,100	$10,000	$1,427,937.50

[ ] The determination of restitution is deferred until. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §3664(i), all nonfederal victims must be paid before the United States is paid.

Name and Address of Payee	**Total Loss	Restitution ordered	Priority or percentage
Zomax, Inc. Attn: Anthony Angelini 5253 Nathan Lane Plymouth, MN 55442-1952		$949, 864.03	
St. Paul Travelers Insurance Co. 385 Washington St. St. Paul, MN 55102		$478,073.47	
TOTALS:	$0.00	$1, 427,937,50	0.00%

[ ] Restitution amount ordered pursuant to plea agreement $.

[ ] The defendant must pay interest on restitution and a fine of more than 52,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[x] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[x] the interest requirement is waived for the [x] fine [x] restitution.

[ ] the interest requirement for the: [ ] fine [ ] restitution is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title I8 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [x] Over the period of incarceration, the defendant shall make payments of either quarterly installments of a minimum or S25 if working non-UNICOR or a minimum of fifty percent of monthly earnings if working UNICOR. It is recommended that the defendant participate in the Inmate Financial Responsibility Program while incarcerated. Payment of any remaining balance is due in monthly installments of not less than 540,000 per month over a period of three years commencing thirty days after release from confinement. Payments are to be made payable to the Clerk, U.S. District Court, for disbursement to the victims. The interest requirement is waived.

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the

defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[ ] The defendant shall pay the cost of prosecution.
The defendant shall pay the following court cost(s):

[x] The defendant shall forfeit $1,990,000 to the United States:

Payments shall be applied in the following order: (I) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including costs of prosecution and court costs.

* * *

(In chambers.)

THE COURT: Okay. Counsel, let the record reflect that we're gathered in chambers, that counsel have submitted proposed instructions to the Court, and the Court has considered all of those instructions and has prepared a set of proposed instructions with respect to the case.

In turn, we've had an opportunity to review the proposed instructions off the record, and we now return to the record with respect to the matter, and we'll deal with the instructions either by a ruling or by further discussion.

Instructions number 1 through 6 are accepted without objection. Instruction number 7 is removed because it's duplicatus of a later instruction. That will cause all instructions in the final form to the jury to be backed up one, in case we don't have a hard copy for you when you argue in the morning, but otherwise we'll proceed.

As to instruction number 9, the third sentence will be removed. However, the accuracy of those charts has been challenged, that is stricken.

Continuing to instruction number 12, the second paragraph, the sentence has a period after the word "transactions." It's monetary transactions, period, and the balance is stricken.

Instruction number 14, at the end of paragraph A,

* * *

objects on the first page, and I think there is agreement to take out a sentence on the second page. This is true even if his belief that his -- no, I guess

there isn't an agreement on this. There is a ruling on my part over the defendant's objection.

MR. MICHAEL: Correct.

THE COURT: This is true even if his belief that he is complying with the law is irrational or unreasonable, I think that goes too far.

MR. DOCHERTY: And our objection on the first page, Your Honor, is to the first sentence of the third paragraph. An individual who has a good faith belief, this is, again, having to do with criminal liability for making false statements.

There is no suggestion here of criminalizing any false statements that Mr. Anderson made or may have made. They are simply introduced as evidence in the case, and therefore that sentence is not applicable, especially when it says be found guilty.

MR. MICHAEL: And the defense position, Judge, is, this is correct. The government has elicited a great deal of testimony, and in fact, has alerted the Court and defense that they intend to argue Mr. Anderson provided inaccurate information to the public and is therefore appropriate.

* * *

THE COURT: That page I will leave as is. Second page, I will take out the sentence previously read, discussed.

Instruction 33, advice of counsel is stricken in its entirety.

Instruction 34, venue, Mr. Michael?

MR. MICHAEL: Judge, with respect to this we believe, and I will pull the case tonight that the Gaudet case means if there is an element, and we believe venue is an element of the offense, every

element must be proved beyond a reasonable doubt, and that this is an appropriate instruction, but for the standard of proof that is currently in it, and therefore I'll provide the Court in the morning with the Gaudet case and see whether I'm right or not.

THE COURT: Okay.

MR. DOCHERTY: For purposes of the record, the government will forego arguing for any additions to that instruction on the basis of defense counsel's representation that he does not intend to argue venue to the jury.

THE COURT: Okay. And for the purposes of the Court's ruling with respect to this, I will let you bring the Gaudet case tomorrow. With respect to your position beyond a reasonable doubt, I think that the instruction as

* * *

intent. Such direct proof is not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom. Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the Government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

In order to sustain the charges against the

defendant, the Government must establish beyond a reasonable doubt that he knew that his conduct in the scheme was calculated to deceive, and nonetheless, the defendant associated himself with the alleged fraudulent scheme.

I will now define certain terms for you, relevant to the charge of securities fraud:

The term "security" includes stock.

The term "exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a

* * *

the defendant because the defendant does not have any obligation to prove anything in this case. It is the Government's burden to prove to you, beyond a reasonable doubt, that the defendant acted with the intent to defraud, knowingly, or willfully.

The Government must prove by the preponderance of the evidence that the offenses charged were begun, continued, or completed in the District of Minnesota.

To prove something by the preponderance of the evidence is to prove that it is more likely true than not true. This is a lesser standard than proof beyond a reasonable doubt. The requirement of proof beyond a reasonable doubt applies to all other issues in the case.

It is the position of the defendant that he is not guilty of any of the 11 counts he is still charged with.

Counts 8 through 13 charge the defendant withselling Zomax stock during the month of August on the basisof material, nonpublic information. In response to those allegations, the defendant's position

is that any information he possessed prior to those sales was unreliable and therefore not material. Further, it is his position that his August sales were based upon considerations that had nothing to do with that unreliable information.

It is the defendant's position that when he sold stock in August, it was with the belief that Zomax business

* * *

was going to be better than the prior reports and better than the results for the prior year.

In response to the financial transactions charged in Counts 25 through 29, the defendant's position is that since the August sales were completed lawfully, the expenditure of funds from those sales is also completely lawful.

Now, members of the jury, in conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict -- whether guilty or not guilty -- must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to

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